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Nos. 162, 163, 164

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1955.**

**EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL.,**  
**APPELLANTS**

**v.**

**FROZEN FOOD EXPRESS, THE SECRETARY OF AGRICULTURE, ET AL.**

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**

**FROZEN FOOD EXPRESS, ET AL.**

**AKRON, CANTON & YOUNGSTOWN R. R. CO., ET AL.,**  
**APPELLANTS**

**v.**

**FROZEN FOOD EXPRESS, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON**  
**DIVISION**

**MOTION TO AFFIRM**

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## MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Ezra Taft Benson, Secretary of Agriculture, move that the judgment of the district court be affirmed.

## STATEMENT

These are direct appeals from that portion of a final judgment, entered February 23, 1955, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, which set aside in part an order of the Interstate Commerce Commission. The order directed a motor carrier to cease and desist from transporting certain commodities without a certificate of public convenience and necessity.

Section 203 (b) (6) of the Interstate Commerce Act exempts from the Act's economic regulatory provisions motor vehicles used in carrying "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)."

In December 1953, three motor carriers filed a complaint with the Commission alleging that appellee Frozen Food Express had transported fresh and frozen meats and fresh and frozen dressed poultry without certificate authority. Frozen Food admitted the transportation but contended that it came within the agricultural exemption. The Commission held that neither commodity was exempt, and issued a cease-and-desist order.<sup>1</sup> *East Texas Motor Freight Lines v. Frozen Food Express*, 62 M.C.C. 646. The Commission concluded that although live poultry is an agricultural commodity, neither killed poultry nor any product thereof is such a commodity. The Commission further held

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<sup>1</sup> The case was decided on stipulated facts without a hearing.

that fresh and frozen meats are neither "ordinary livestock" nor "agricultural commodities."<sup>2</sup>

On appeal the Secretary of Agriculture intervened as appellant and the United States, a statutory defendant, agreed generally with his position. The district court unanimously set aside the cease-and-desist order in so far as it related to fresh and frozen dressed poultry. The court held that those products are "agricultural commodities," and that the processing which they underwent did not make them "manufactured products thereof." The court upheld the Commission's finding that fresh and frozen meats are not exempt, and no appeal has been taken from that determination.<sup>3</sup>

The pertinent facts relating to the processing of poultry, as found by the Commission (Jurisdictional Statement, No. 162, App. 17a), are as follows:

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<sup>2</sup> As the Commission noted (Jurisdictional Statement, No. 162, App. 15a), the Act always has provided separate exemptions for "livestock" and for "agricultural commodities." The Commission held (*ibid.*) that "ordinary livestock" refers only to live animals which cease to be such upon being slaughtered, and that the exemption for "agricultural commodities" does not include packing-house products.

<sup>3</sup> More than two years prior to the issuance of the cease-and-desist order the Commission, after extensive administrative proceedings, had issued a lengthy report in which it determined whether particular agricultural commodities were within the exemption. Frozen Foods filed a separate suit in the district court to set aside the Determination, but the court dismissed the action without considering the merits, on the ground that the Determination was not a reviewable order. The appeals in Nos. 158-161 are from that judgment of dismissal.



Most poultry is shipped alive from farms to processing plants, where the birds are "first placed on an endless chain and then carried by the chain through the various stages of processing, which include killing, picking, pinning, singeing, cropping and venting, washing, chilling, eviscerating, packaging, and freezing. Picking is done both by machinery and by hand, the mechanical picker consisting of revolving drums equipped with rubber fingers. In some plants the removal of feathers is accomplished by the use of hot wax. The usual method of chilling is to place the carcasses in metal baskets which are then submerged in tanks of ice water long enough to remove all body heat. In the eviscerating process, the body cavity is cut open and the viscera removed, with the liver, heart, and gizzard being cleaned and replaced in the carcass. The eviscerated poultry is then usually wrapped in waterproof paper and packed with ice in crates or barrels. Various methods of dry wrapping are also employed. The freezing of poultry must be accomplished as rapidly as possible and is generally done in a mechanically refrigerated room in which the temperature is maintained at minus 40° Fahrenheit (sic) and the air is circulated at speeds up to 70 miles an hour. After the birds have been frozen by this quick-freeze method, they are placed in cold storage until ready for shipment."

#### ARGUMENT

These appeals present only the narrow question whether fresh and frozen dressed poultry consti-

ite non-manufactured agricultural products which are within the agricultural exemption of Section 203 (b) (6). We submit that the district court's affirmative answer to that question is clearly correct, and that there is no occasion for further review by this Court.

The rationale of the Commission's decision was that although live poultry admittedly is an agricultural commodity, killed poultry or any product hereof is not. But poultry does not cease to be an agricultural commodity and become a "manufactured product" merely because it has been killed.

The stipulated facts showed, as the district court stated (Jurisdictional Statement, No. 162, App. A), "that before a chicken or duck became dressed poultry, the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc." Such limited processing, which does not alter the basic character of the product as "poultry," is not sufficient to turn it into a "manufactured product" within the meaning of Section 203 (b) (6). This conclusion is supported by the legislative history of the Act, the settled judicial construction of the term "manufactured," and the only other judicial decision on the question.

1. In an earlier draft, the Motor Carrier Act provided an exemption only for "livestock or *unprocessed* agricultural products" (H. Rep. No. 645, 74th Cong., 1st Sess., p. 1, emphasis supplied). But after fear had been expressed during debate in the House that this provision would not exempt

such processed products as ginned cotton or pasteurized milk, the bill was amended to "strike out the word 'unprocessed' and make it apply only to manufactured products." 79 Cong. Rec. 12,220. The present exemption for "agricultural \* \* \* commodities (not including manufactured products thereof)" thus was intended to cover all non-manufactured agricultural products, processed as well as unprocessed. This interpretation of the Act is further supported by the fact that Congress repeatedly has rejected all attempts to amend the Act to limit the exemption to transportation from the point of production to the point of primary marketing, processing, manufacture or trans-shipment.<sup>4</sup>

The Commission's findings show that dressed or frozen poultry has undergone substantial processing. But such processing is not enough to change it into a manufactured product. Manufacture "implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary \* \* \*. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.' " *Anheuser-Busch Assn. v. United States*, 207 U.S. 556, 562. Although a chicken admittedly is "changed" by dressing and freezing, such change

<sup>4</sup> See *Omnibus Transportation Legislation*, House Committee Print, 76th Cong., 3rd Sess.; S. 2357, 82nd Cong., 2d Sess.; S. Rep. No. 1615, 82nd Cong., 2d Sess.; H. Rep. No. 2175, 82nd Cong., 2d Sess. One proposed bill (H.R. 7547, 81st Cong., 2d Sess.) would have specifically limited the agricultural exemption, in the case of poultry, to "live poultry."



is not enough to make it "a new and different article"; it is still a chicken, albeit a frozen and dressed one.

This Court repeatedly has held that processing comparable to that undergone by poultry in dressing and freezing does not produce a "manufactured" article. Such non-manufactured products have included dressed lumber (lumber which has been planed, grooved, and tongued or beaded),<sup>5</sup> oranges which have been impregnated with borax to make them decay-resistant,<sup>6</sup> sea shells which, after removal of several layers of inner shells, have been polished and had mottoes etched on the polished inner shell,<sup>7</sup> and corks which have been cleaned in an air pressure machine, washed, steamed, dried, and bathed and coated.<sup>8</sup>

We submit that the district court correctly interpreted Section 203 (b) (6) as exempting the transportation of agricultural commodities which, although they have undergone substantial processing, have not been converted into different products by manufacture. The processing which cotton undergoes in ginning is comparable to that undergone by poultry in dressing and freezing. Each remains basically the same product despite the processing, and each is therefore covered by the exemption.

2. In *Interstate Commerce Commission v. Allen E. Kroblin*, 113 F. Supp. 599 (N.D. Iowa), the dis-

<sup>5</sup> *United States v. Dudley*, 174 U.S. 670.

<sup>6</sup> *Fruit Growers, Inc. v. Brodex Co.*, 283 U.S. 1.

<sup>7</sup> *Hartranft v. Wiegmann*, 121 U.S. 609.

<sup>8</sup> *Anheuser-Busch Assn. v. United States*, 207 U.S. 556.

strict court, after an exhaustive review of the legislative history, concluded that dressed or eviscerated poultry was a non-manufactured agricultural product and accordingly was exempt under Section 203 (b) (6). The Court of Appeals unanimously affirmed, 212 F. 2d 555 (C.A. 8) and this Court denied certiorari, 348 U.S. 836. The *Kroblin* case involved substantially the same question as the cases at bar, and there is no more compelling reason for further review by this Court here than there was in *Kroblin*. Other lower federal courts also have held that similar processing of agricultural commodities does not turn them into manufactured products under Section 203 (b) (6). *E.g.*, *Interstate Commerce Commission v. Yeary Transfer Co.*, 202 F. 2d 151 (C.A. 6) (redried tobacco); *Interstate Commerce Commission v. Wagner*, 112 F. Supp. 109 (M.D. Tenn.) (scoured wool).

## CONCLUSION

For the foregoing reasons we submit that the decision below is clearly correct, and that the questions involved do not call for further review by this Court. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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AUGUST 1955